In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,

Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

Albert J. Ahern
1200 - 18th Street, N. W.
Washington, D. C. 20036
Counsel for Amicus

Washington, D. C. THIEL PRESS 202 393 0625

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STATEMENT OF INTEREST

The National Congress of American Indians, Inc. (NCAI) is a nonprofit association of 87 Indian tribes. Its purpose is to promote the interests of American Indians. It was incorporated in Oklahoma in 1954, and its national headquarters is at 1346 Connecticut Avenue, N. W., Washington, D. C.

NCAI supports the position of the petitioner, the Puyallup Tribe, and joins the petitioner in arguing that the decision

of the Supreme Court of Washington was erroneous, to the extent that it held that the Puyallup Tribe's off-reservation activities are subject to all "reasonable and necessary" state conservation regulations.

NCAI is much concerned with this case because it involves hunting and fishing rights, which are one of the most important issues to Indian tribes today. These rights are under attack in the Northwest states and in Oklahoma, Michigan, Wisconsin,[1] and elsewhere, as the urban areas expand and approach the rural Indian communities, and as the demand increases for the diminishing supply of inland fish and game. The National Congress of American Indians is the organization best qualified to speak for the thinking of the Indians in this country.

ARGUMENT

In 1854, the United States persuaded the Puyallup Indians to cede practically all of their land. The Indians did so, reserving (a) a small amount of land, and (b),

> "The right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory."[2]

Today their reservation is gone, and they have nothing left except whatever rights are protected by the quoted language.

The Washington Supreme Court held that the Indians are subject to all conservation regulations which are "reasonable and necessary to conserve the fishery."[3] This is ambiguous language, and requires some background to see what the court may have meant.[4]

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[1] The Wisconsin litigation is now before this Court. *Menominee Tribe v. United States*, No. 187, Q.T. 1967, argued Jan. 22, 1968.

[2] 10 Stat. 1132, Art. III.

[3] 422 P.2d at 761.

[4] The following discussion is taken largely from the comprehensive discussion in Hobbs, *Indian Hunting and Fishing Rights*, 32 Geo.Wash. L.Rev. 504, 523-527 (1964).

The Race Horse Case

The first case in this Court on state regulation of Indian treaty hunting and fishing rights outside the reservation was *Ward v. Race Horse*, decided in 1896.[5] The Bannock Indians ceded land, and the treaty said, "[T]hey shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon . . . ."[6] A Bannock hunted elk on unoccupied land of the United States, one hundred miles off the reservation, in the Indians' former hunting district, within the then new state of Wyoming. This Court held that "unoccupied lands of the United States" did not mean lands within a state which had been admitted into the Union. According to the Court, the terms of the treaty showed that the reserved hunting right was "temporary and precarious," and subject to extinction at any time. This Court held that the admission of Wyoming into the Union on equal footing with the other states had the effect of abrogating the Bannock treaty as far as lands in Wyoming were concerned. The Court felt that the treaty hunting right and the state right to regulate hunting were incompatible.[7]

Despite its broad language, it is clear that *Race Horse* means no more than that off-reservation hunting rights are subject to state regulation. The language to the effect that admission of the state totally wiped out any rights has long since been modified by this Court.[8]

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[5] 163 U.S. 504 (1896).

[6] Id. at 505.

[7] Congress evidently did not agree with this Court's decision; in 1900 it paid the tribe $75,000 as damages for the loss of the treaty right as a result of this Court's decision. S.Rept. 69, 56th Cong., 1st Sess. 2 (1900).

[8] See *United States v. Winans*, 198 U.S. 371 (1905), and *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919). These cases recognized the survival of such rights as against private interference.

The next case was *New York ex rel. Kennedy v. Becker*.[9] In 1797, the Seneca Indians ceded land to a private individual by a treaty approved by the United States, and proclaimed by the President. The Indians, however, reserved "the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." Later, several Seneca Indians were arrested for fishing on the ceded land in violation of state laws. This Court, citing *Race Horse*, said the Indians could fish on the ceded land, but subject to state regulation.

At this point the rule appeared to be that an Indian exercising off-reservation treaty rights was subject to state regulation like other citizens, and the lower courts, mostly in the State of Washington, routinely applied the rule.[10]

The Tulee Case

Then in 1942 this Court in the *Tulee* case[11] held that Indians owning such rights at least did not have to buy fishing licenses. The Court said that the state could impose on such Indians such restrictions concerning the time and manner of fishing outside the reservation —.[12]

> ". . . as are necessary for the conservation of fish."

The Court did not spell out what "necessary" meant. In an extreme sense, almost any fishing restriction could be considered "necessary" for conservation, in that, hypothetically, if the restriction were simultaneously disregarded by a million Indians, the fishery might be destroyed. In a more reasonable sense, however, almost no fishing restriction is

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[9] 241 U.S. 556 (1916).

[10] See *State v. Wallahee*, 143 Wash. 117, 255 Pac. 94 (1927); *State v. Meninock*, 115 Wash. 528, 197 Pac. 641 (1921); *State v. Alexis*, 89 Wash. 492, 154 Pac. 810 (1916); *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805 (1916); *State v. La Barge*, 254 Wis. 449, 291 N.W. 299 (1940); *State v. Morrin*, 136 Wis. 552, 117 N.W. 1006 (1908).

[11] *Tulee v. Washington*, 315 U.S. 681 (1942).

[12] Id. at 684.

"necessary" as applied to Indians, because as a practical fact, their populations are small (there are only about 18,000 Indians in the whole State of Washington), and the small number of fish they take, even when disregarding state restrictions, presents no threat to the fishery. The court below found that the Indians took only 3 to 5 percent of the fish in the stream involved. Only in the case of extreme overfishing (and there may have been a few such cases) would it be "necessary" to apply any restrictions to Indian fishing in order to save a fishery from harm.

The Ninth Circuit Rule

The first case to consider what this Court meant by "necessary" was *Makah Tribe v. Schoettler*.[13] There the Ninth Circuit struck down a state rule in effect totally prohibiting any fishing in a certain stream, a place where the Indians had treaty rights to fish. The court held that since conservation could be achieved by partial prohibition of fishing, the total prohibition was not "necessary," and hence was not applicable to the Indians

The same court considered the question again in *Maison v. Confederated Umatilla Tribes*.[14] It laid down the general rule that when the state proposes to restrict Indian fishing, the restriction will be "necessary" and hence valid to apply to Indians only if conservation cannot be accomplished by restriction of non-Indian fishing. In other words, the state must try to achieve conservation first by restricting non-Indians, who have no treaty rights, and only if that would not be sufficient may it restrict the treaty rights of the Indians.

The same court recently reiterated its rule in *Holcomb v. Confederated Umatilla Tribes*.[15]

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[13] 192 F.2d 224 (9th Cir. 1951).

[14] 314 F.2d 169 (9th Cir. 1963), *cert. den.*, 375 U.S. 829.

[15] 382 F.2d 1013 (9th Cir. 1967).

The Idaho Rule

In the meantime, in *State v. Arthur*,[16] the Idaho Supreme Court went even further – it held that Indian treaty hunting rights are *wholly* immune from state regulation, and this Court declined to review the case.[17]

The Washington Rule

Against this background, the Washington courts in 1954 first faced the issue of what *Tulee* meant, when a Puyallup Indian named Satiacum was arrested for fishing in violation of state fishing regulations. The trial court applied the Ninth Circuit rule and dismissed the prosecution on the ground that the state had not shown that the particular regulations were "necessary" to be applied to the Indians.

The Washington Supreme Court affirmed, but split four to four on the reason for affirmance.[18] Half of the court thought the trial court was right in following the Ninth Circuit rule. The other half went even further and endorsed the Idaho rule to the effect that the state could not regulate the Indians at all.

The local reaction to the *Satiacum* decision was vehement, leading, among other things, to the introduction of resolutions in Congress to overrule the Idaho rule.[19]

The Washington court had a chance to reconsider *Satiacum* in the *McCoy* case.[20] In that case a Swinomish Indian

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[16] 74 Ida. 251, 261 P.2d 135 (1953), *cert. den.*, 347 U.S. 937.

[17] Canada likewise apparently follows a no-regulation-at-all rule. *Regina v. White*, 50 D.L.R.2d 613 (Brit. Col. Ct. App. 1964), *aff'd* 52 D.L.R.2d 481 (Sup. Ct. Can. 1965).

[18] *State v. Satiacum*, 50 Wash. 2d 513, 314 P.2d 400 (1957).

[19] H.R.J. Res. 48, 88th Cong., 1st Sess. (1963); H.R.J. Res. 698, 87th Cong., 2d Sess. (1962).

[20] *State v. McCoy*, 63 Wash. 2d 421, 387 P.2d 942 (1963). The *McCoy* case induced a group of Nisqually Indians to defy the *McCoy* rule; they raised an American flag at their off-reservation fishing station and announced a "fish-in." Marlon Brando joined them. All were

(with the usual "accustomed station" treaty right) fished just outside his reservation with a 600-foot gill net, a rig capable of taking very large numbers of fish. He sold his fish commercial. State regulations had closed the place to fishing temporarily in order to allow the peak of the salmon run to pass upstream to spawn. The state, hoping that the court would apply the Ninth Circuit rule instead of the Idaho rule, offered evidence that unless the closure applied to the Indians, the fishery in that stream (the Skagit River) would be destroyed. The trial court, following the Idaho rule, rejected the evidence on the ground that the state could not regulate these treaty rights, regardless of the effect on the fishery.

The Washington Supreme Court, apparently mindful of the reaction to its *Satiacum* opinions, had a much different attitude now. It reversed seven to one and sent the case back for a new trial, saying the state's evidence should have been admitted. But instead of announcing that it was adopting the Ninth Circuit rule, it seemed to revert all the way back to the old *Race Horse* rule. It said that upon admission into the Union, the state acquired the power to regulate the Indians' off-reservation treaty rights, and that this power could not be denied except on clear and unequivocal expression of congressional will by Congress.

The majority opinion of Justice Rosellini was joined in by four other justices. Two more concurred in the result; they thought that a 600-foot gill net was an improper extension of the fishing right, but that the state could not prevent fishing by traditional gear. One justice dissented.

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arrested. Brando was freed on ground that he was seeking publicity only. One of the Indians said the state game department "must think the steelhead [salmon] swam over behind the Mayflower." Aberdeen (Wash.) Daily World, Jan. 22, 1964.

The Present Case

This was the background, then, when the instant case arose. The trial court seemed to adopt the *Race Horse* approach suggested by the *McCoy* case, that the Indians had no immunity at all from state regulation; it said:[21]

> "They [the Indians] are citizens of our country and state, with all the rights, privileges and responsibilities of any other citizen, no more – no less."

But on appeal, the Washington Supreme Court revealed that it felt the Indians had some rights under the treaty, but that those rights were subject to state regulation where "reasonable and necessary to preserve the fishery." It said the state had clearly proven that continued use of the nets involved in the case would result in the nearly complete destruction of the fish, and therefore the state could prohibit the Indians from that sort of fishing.

The court was not explicit as to why its ruling was different than the Ninth Circuit rule (which it characterized as "unworkable"), but evidently it assumed the Ninth Circuit rule would have required the state to cut down or eliminate sports and commercial fishing in the waters involved, before it could restrict the Indian fishing. But if the court below was correct in characterizing these nets as catching almost all the fish which passed that point, elimination of sports and commercial fishing would not have saved the fishery from destruction, and so it seems to us that even under the Ninth Circuit rule the state could have restricted these nets.

In rejecting the Ninth Circuit rule, it is clear that the court below intended the treaty rights to be something less than the Ninth Circuit held. How much less is not clear, but the tone of the opinion implies a great deal less. To the extent that it reduces the rights to anything less than the Ninth Circuit's ruling, NCAI strongly opposes it.

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[21] Appendix to Petition for Certiorari, p. A-18.

CONCLUSION

It would be unfortunate and unfair to the Indians, who still depend so much on hunting and fishing for subsistence, to reduce their treaty rights to such a small residuum as the Washington court apparently intends. There is no need to reduce the rights so drastically, because ordinarily the Indians pose no threat at all to the game and fish resources, and in those cases where they do, the Ninth Circuit rule affords adequate means for redress.

One not familiar with Indians and how they think (at least the typical reservation Indians) cannot appreciate how important hunting and fishing rights are to them, not only because of their poverty, but also because of their Indian traditions. Hunting and fishing (by individuals for subsistence) has a symbolic, perhaps quasi-religious meaning to many Indians. It is a practicing of their ancient culture, something many of them cling to fiercely in the face of the efforts of the state governments, and sometimes even the federal government, to eliminate Indian rights in the name of progress and equality. Many non-Indians feel that treaty promises made 100 years ago have outlived their purpose. The Indian thinks not; to him the treaty promises are as alive as if made yesterday. These promises should not be broken without the agreement of the Indians.

Respectfully submitted,

Albert J. Ahern
Counsel for Amicus

February 1, 1968